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02
03 UNITED STATES DISTRICT COURT
04 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

05 SCOTT DEAN CULP,) CASE NO.: C08-0714-JCC-MAT
06)
07 Petitioner,)
08)
09 v.) ORDER DENYING PETITIONER'S
MOTION FOR STAY AND
10 BRUNO STOLC,) ABEYANCE
11)
12 Respondent.)
13 _____)

14 This is a federal habeas action brought under 28 U.S.C. § 2254. Currently pending before
15 the Court is petitioner's motion for stay and abeyance. Petitioner argues in his motion that these
16 proceedings should be stayed while he exhausts his unexhausted claims. Petitioner indicates in his
17 motion that he is attempting to exhaust his claims by way of a personal restraint petition which is
18 currently pending in the state courts. Respondent opposes petitioner's motion for stay and
19 abeyance.

20 A district court, on federal habeas review, has discretion to stay a mixed petition to allow
21 a petitioner to return to state court to present his unexhausted claims. *Rhines v. Weber*, 544 U.S.
22 269 (2005). However, the Supreme Court made clear in *Rhines* that the stay and abeyance
procedure should be invoked only in very limited circumstances. *Rhines*, 544 U.S. at 277. The
Supreme Court identified the following circumstances which would warrant a stay: (1) the
petitioner has good cause for his failure to exhaust; (2) the unexhausted claims are potentially

01 meritorious; and, (3) there is no indication that the petitioner engaged in intentionally dilatory
02 litigation tactics. *Id.* at 278.

03 The record before this Court fails to make clear that the requested stay is either necessary
04 or appropriate. First, while petitioner indicates that he currently has a personal restraint petition
05 pending in the state courts, respondent has provided documentation demonstrating that petitioner
06 has filed two personal restraint petitions in the state courts related to the conviction under attack
07 in these proceedings and that both of those petitions have been resolved. Second, petitioner
08 indicates in his federal habeas petition that he presented each of his federal habeas claims to the
09 state courts in a personal restraint petition which was filed in the Washington Court of Appeals
10 in June 2007. That petition was dismissed by the Court of Appeals on July 17, 2007, and
11 petitioner's subsequent motion for discretionary review was denied by the Washington Supreme
12 Court on January 2, 2008. A certificate of finality was issued in those proceedings on April 18,
13 2008.

14 If petitioner is now of the belief that he has not, in fact, properly exhausted the claims
15 asserted in federal habeas petition, exhaustion could only be accomplished by returning again to
16 the state courts. As respondent correctly points out in his response to petitioner's motion, if
17 petitioner were to attempt to file a third personal restraint petition, the state courts would likely
18 find any such petition to be time-barred under RCW 10.73.090, and/or procedurally barred as
19 either successive or abusive under RCW 10.73.140.

20 As it does not appear from the record that petitioner is currently attempting to exhaust any
21 claims in the state courts, and as it further appears that any future attempt to exhaust any
22 unexhausted claims would be futile, petitioner's motion for stay and abeyance (Dkt. No. 15) is

01 DENIED.

02 The Clerk is directed to send copies of this Order to petitioner, to counsel for respondent,
03 and to the Honorable John C. Coughenour.

04 DATED this 20th day of October, 2008.

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07 Mary Alice Theiler
08 United States Magistrate Judge
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